

5-1-1973

# The Legal Aspects of Containerization

C. Douglas Skinner  
*University of Rhode Island*

Follow this and additional works at: [http://digitalcommons.uri.edu/ma\\_etds](http://digitalcommons.uri.edu/ma_etds)



Part of the [International Law Commons](#), and the [Oceanography and Atmospheric Sciences and Meteorology Commons](#)

---

## Recommended Citation

Skinner, C. Douglas, "The Legal Aspects of Containerization" (1973). *Theses and Major Papers*. Paper 196.

This Major Paper is brought to you for free and open access by the Marine Affairs at DigitalCommons@URI. It has been accepted for inclusion in Theses and Major Papers by an authorized administrator of DigitalCommons@URI. For more information, please contact [digitalcommons@etal.uri.edu](mailto:digitalcommons@etal.uri.edu).

THE LEGAL ASPECTS OF CONTAINERIZATION

MASTER OF MARINE AFFAIRS  
UNIV. OF RHODE ISLAND

C. Douglas Skinner  
Marine Affairs Program  
University of Rhode Island  
Kingston, Rhode Island  
May 1, 1973

## Acknowledgement

A great deal of credit must go to my father-in-law, Mr. John O'Neill of Riverside, Connecticut, who, through an associate, Mr. Lou Conti of General American Transportation Corporation (GATX), put me in touch with Mr. Dan Sundel, a retired vice president of the New Haven Railroad and now retained in an advisory capacity by GATX. Mr. Sundel was involved in containerization from the outset; in fact, it was he who held the since-expired copyright on the word "Trail-liner," forerunner of the term piggyback to describe the positioning of a "semi" trailer van on a flatcar. Mr. Sundel graciously devoted an entire day to me, and opened many doors, particularly those of Mr. Giles Morrow, Secretary-General Counsel to United States Freight, and Mr. Edward Norberg of Dart Containerline, who teaches the country's only course on containerization at the Roosevelt Institute in New York City. Both men were also extremely generous with their time and provided a personal touch otherwise unavailable. My special thanks again go to Mr. Sundel, whose patience and experience were invaluable.



## CONTENTS

INTRODUCTION . . . . .	1
The Ocean Segment; Traditional Shipping Methods; World Trade Determinants	
DEVELOPMENT . . . . .	4
The Railroads and Piggyback; The Containership; Advantages and Dislocations; Format; Labor; Land Acquisition	
IMPLEMENTATION . . . . .	13
The Fleet; The North American Land Bridge; Overcapacity; Rate Wars; Pooling; Feeder Systems and Port Servicing; Domestic Intermodal Regulation	
PROCEDURAL . . . . .	20
Documentation; Paperwork Reduction; Adaptation to Technical Innovations; The Ocean Freight Forwarder	
LIABILITY AND INSURANCE . . . . .	30
Common and Uncommon Practices; The Interested Parties; Containerization's Impact; Intermodalism; The Through Bill of Lading; The TCM	
CONCLUDING REMARKS . . . . .	44
Balance of Trade; The Federal Government's Role; Catching Up With the Present; Liability, Insurance, and Rates.	
BIBLIOGRAPHY . . . . .	48



## Legal Aspects of Containerization

A not-so-quiet revolution has been sweeping the transportation industry with the advent of containerization, a practice wherein goods are loaded into a 20' X 40' X 8' box of metal, wood or fiberglass, sealed, and shipped as a unit or package via rail, truck, freighter, or even air. While the use of the container for point-to-point shipment is part of the larger aspect of intermodal transportation, or the process through which the container travels by way of the differing methods or modes of transportation, this paper will deal primarily in how the ocean shipping industry interacts legally with the other transportation forms in international shipping, as well as how the use of containers affect only the ocean industry. At the risk of falling victim to one of the most common difficulties in discussing intermodalism, namely "Mode Myopia," or seeing problems only as they relate to one particular method of transport and not from the vantage point of integrated, well-interfaced shipping modes, this paper will concentrate on legal problems encountered by the ocean community. In a world ever more interdependent, the ocean segment is the key to international trade.

Discussions of containerization that are limited to one continent become comparisons of the relative advantages of competing transportation methods that have, in most respects, identical capabilities. That barge, truck and rail systems are in vigorous competition only bears out this contention.

However, for the great majority of goods that must be transported overseas, there is no substitute for the ocean freighter. Ocean transport is the key for, without it, everything comes to a grinding halt at the pier. Due not only to the quantity of cargo a large ship can carry, but also the aforementioned lack of alternative methods, the ocean mode is critical, and barge, rail, and truck networks are appropriately referred to as "feeder lines."

It may be useful, therefore, to examine traditional shipping methods before going into containerization. While the number of required handlings was a function of the destination and transport methods, traditionally consignments received too much attention at each mode interface, from the viewpoint of the manufacturer, the consignee, the insurer, and, in many instances, the carrier. From plant to warehouse, from warehouse to truck, from truck to boxcar, then again to truck before being loaded on board a ship and, at the other end of the voyage, onto truck or flatcar before going to the consignee, goods were handled a minimum of seven times, often more, being loaded and unloaded at each change of transportation mode.<sup>1</sup> The break bulk method of loading a ship, using slings to lift hundreds or thousands of cartons, crates, boxes, and packages in varying sizes, shapes, and weights, became more expensive, and thus less attractive, mostly because of increased stevedoring costs but also because of the spiraling costs of an unproduc-

<sup>1</sup> Daniel S. Sundel, private interview held in New York City April 2, 1973.



tive ship at pierside. Loss and damage expenses, and the cost of insurance to cover them, also rose. But these are only the most obvious factors affecting world trade.

Communications and advancing technology exerted stronger yet more subtle influences. Historically, trade went to the nation that could produce. The buyer's decision was based not only on the production ability, but the quantity, the quality, the market price, the availability, and the financing; technology and technical capacity being the determining factors. With efficient communication to spread technical know-how and the spread of giant corporations throughout the world, several nations offer the same product today.

"The new determinants of trade are availability and final delivery price, all cost factors considered. This, for practical purposes, means that the manufacturer or seller has access to dependable means of transport which can deliver the goods at minimum cost, with minimum delay, and maximum certainty that the goods will be delivered in a condition to be accepted."<sup>1</sup>

In a business such as ocean transportation, lacking substitute methods of getting the job done, exceptionally vigorous competition arises within the industry. Whether break bulk or container,

"In waterborne transportation today the primary factor relied upon by a shipper when selecting a carrier, after an evaluation of the transportation available, is the service provided by the carriers in the trade."<sup>2</sup>

<sup>1</sup> John R. Immer, Container Services of the Atlantic, 1970 (Washington, D.C.: 1970), 40.

<sup>2</sup> Docket 68-8, Disposition of Container Marine Lines Through Intermodal Container Freight Tariffs Numbers 1 and 2, FMC Numbers 10 and 11, Decisions of the Federal Maritime Commission, Vol. II, July 1967-June 1968 (Washington, D.C.: U.S. Government Printing Office, 1969)



## Development

The railroads were the first to introduce a form of intermodal transport. In the 1890's, potato trucks were placed on railroad flatcars for travel from Long Island to Brooklyn. The Chicago and Milwaukee Railroad tried piggyback, placing a trailer on a car, but in the 1920's found no advantage because of the low labor rates. Most of the New England steamship lines, which transported textiles from places such as Fall River to New York City, collapsed in 1934, rejuvenating the trucking industry. The New Haven Railroad, which had owned seven of the steamship lines, offered piggyback - then called "Trail-liner," service in 1937 to meet this competition.<sup>1</sup>

Considerable credit must go to Malcolm McLean, then head of McLean Trucking, who purchased Waterman Steamship Corporation and its subsidiary, Pan-American Steamship Company, in 1955. The next year, the first trailership, loaded with sixty-five standard American "semi" trailer vans on deck, made a trial run between New York and Houston. Service was expanded

to include Puerto Rico and, by 1962, Oakland, bringing back a once-profitable trade route. The international capabilities could not be ignored, and in 1966 service to Europe was begun.

Later the van was detached from the wheeled chassis to permit stacking of containers aboard ship, and the containership evolved to its present state.<sup>2</sup>

Producers and manufacturers were quick to see the advan-

<sup>1</sup> Daniel S. Sundel, private interview held in New York City April 2, 1973.

<sup>2</sup> Sea-Land Service, Inc., "A History of Sea-Land Service, Inc." Public Information document L-322-01(6/67)



old ones are accentuated and new difficulties are created. While a worldwide system of unit transportation has monumental advantages in time, money, and reliability, the legal obstacles in implementing and facilitating such a system are manifest.

A study of the legal aspects of containerization may be organized in several ways, depending on the degree of emphasis to be given specific characteristics, problems, and solutions. One set is as follows:

Through rates  
Through routes  
Through documentation  
Through responsibility  
Through liability<sup>1</sup>

The conflicts and problem areas given in response to these subject areas are extremely technical in nature and are oriented to solutions at the Federal Government and international levels. Certainly, many of the legal problems encountered can be settled only at these levels, but to give a different feel to the nature of containerization's impact an organizational structure as follows will be developed:

- 1) Implementation
- 2) Procedure, with adaptation to technical innovations
- 3) Liability

Within this framework, each of the "Through" topics - rates, routes, documentation, responsibility, and liability - will be given adequate attention with increased room for ma-

<sup>1</sup> Edward Norberg, of Dart Containerlines, private interview held in New York City April 2, 1973.

neuverability. The position of the carriers, the shippers, and the regulatory agencies may, it is hoped, be examined more objectively in this more flexible outline, with less emphasis on the role of the Federal Government and more on the interactions of the various components, such as the manufacturer, the freight forwarder, the carrier, and the insurer, while still addressing those questions that require discussion.

There are two major aspects that have been intentionally omitted to keep the scope of this paper reasonable. One omission is that of the problem of labor, which would require a separate paper in itself, and the other is the issue of land acquisition. These are, however, of major importance and merit brief discussion. It is an understatement to classify employment as merely a "dislocation" brought about by containerization. The resistance encountered from labor unions is an explosive, emotional issue that is far from settled. To the observer with, it is hoped, a significant degree of objectivity, organized labor has acted as an impediment to new developments in the transportation field. While it is not a secret that unions actively oppose containerized shipments, it is difficult to obtain a successful pattern used in dealing with the problem, due to the differing demands of dockworkers throughout the world, or, for that matter, on each US coast.

Among American unions, the International Longshoremen's Association has generally been regarded as, from their side,



proudly the most militant. Shippers and carriers, in the relatively rare moments they stop fighting over insurance liability, take similar positions regarding the ILA as the most intransigent and unreasonable. In few other industries are the antagonisms so mutual, the feelings so bitter, and the willingness to compromise so rare. In fact, if there is any force capable of stopping the container revolution, it is that of organized labor. Legally, the field of labor relations is a jungle, and insistence on stripping (unloading) and restuffing containers by the unions, combined with, on the one hand, anti-trust immunity from certain actions and, on the other, regulations prohibiting restraint of trade raise legal problems to a new level. Understanding that dockworkers consider the fight over containerization to be for their very survival, the fact remains that the mechanical efficiency of container handling techniques makes impossible meaningful competition from break bulk procedures:

"The approximate comparison in longshore-labor requirements per ton of cargo is, under the most favorable container conditions, 2 man hours per measurement ton of conventional cargo versus 0.1 man hours per measurement ton of containerized cargo. This reduction by a factor of 20, of course, varies for different container sizes, commodities, and locations."<sup>1</sup>

Labor's position in this matter becomes similar to that taken by New York Governor Martin Van Buren in 1829. Writing President Andrew Jackson, the future President exhibited some

<sup>1</sup> Matson Research Corp., The Impact of Containerization, p. 23.

of the shortsightedness that would ensure him one of the places of lesser prominence in Presidential history:

"If canal boats are supplanted by railroads, serious unemployment will result. Captains, cooks, drivers, hostlers, repairmen, and lock tenders will be left without means of livelihood, not to mention the numerous farmers now employed in growing hay for horses. Boat builders would suffer, and towline, whip, and harness makers would be left destitute."<sup>1</sup>

Union leaders similarly refuse to take the long-range view, while the performance of dockworkers is often less than enviable. My research has consistently yielded conclusions to those neatly summed up in a British periodical:

"Both in the United States and the United Kingdom, the unions have demonstrated that they hold the power to dictate to their employers terms which in some cases can completely nullify the advantages that containerisation offers in the way of undisturbed, door-to-door shipment of goods. By their insistence on loading and unloading LCL [less than containerload] units in the unit area, the American dockworkers union, the International Longshoremen's Association, has in addition robbed containerisation of perhaps its most important advantage of all, as far as import and export shipments are concerned - load security. Pilferage - so long regarded as the 'perks' of the docker - remains at a high level, and so do insurance rates (once regarded as a saving with containerisation)."<sup>2</sup>

Another aspect is land acquisition. Large tracts of property are required because of the logistics of containerization. Here the critical factor is "thru-put," or the container to slot ratio. A containership has a certain carrying

<sup>1</sup> Dart Containerline, "Dart News," December 1972, p. 21.

<sup>2</sup> "Labour - The Year's Key Subject," Containerisation International 1970 Yearbook (London: National Magazine Company, Ltd 1969), p. 31.



capacity, determined by the number of slots provided within the environs of her cellular hull. A typical figure is 1100 slots per ship, that is, the ship can carry 1100 containers. However, to operate a container line, the system would halt if all the available containers were on ships in the middle of the ocean. Thus, container operators must have an excess inventory of containers, so continuous shipments may be picked up and delivered. The most common ratio is three containers per slot, or a thru-put of 3 to 1. Thus, for each 1100-slot containership, there must be 3300 20' X 40' containers, or 6600 20' X 20' containers, or the equivalent. Storing this many containers takes considerable space, amounting to some 14 acres per ship berth.<sup>1</sup>

As most ports are in urban areas, the expansion problem becomes serious. In many cities, there is simply not enough room at existing ports, and insufficient funds to acquire high-priced urban land. Containeryards become one more competitor in urban development, and the answer has, at times, to begin anew. The Port Authority of New York and New Jersey has done this on the marshlands of Arthur Kill in constructing Port Elizabeth. In certain localities the response has been the emergence of former small volume, little-utilized ports which, by virtue of using formerly empty space, have become major competitors. This is most notably the case of Oakland, California.<sup>2</sup>

Those ports with little or no expansion possibilities have watched containerization pass them by. Some, like the

1

Edward Norberg, Dart Containerline, private interview held in New York City April 2, 1973.

2 "Oakland Thrives on Containerships," Business Week, (Sept. 9, 1972), pp. 60-62

Port of Providence, eagerly eye the Davisville Seabee base; others, like Boston, must spread operations over a wide area to try to attract container traffic; still others have no place to go. The land acquisition problem will be settled largely by those outside the shipping industry - city councils and other branches of state and local government. The role the transportation industry will play in these situations will vary from one locality to the next, but it appears that little coordinated attention is being directed towards this problem by the container operators.



## Implementation

As a result of the increasing use of containerization procedures, growing pains have appeared in the implementation stage. Some historically common trends have re-emerged, and much activity has come at the Federal Government and international levels. The return of US shipping to a position of world importance has been one result of the container revolution, as well as a new surge in shipbuilding here and abroad. Containerization has reversed the dwindling tonnage carried under the US flag; in fact, the American container fleet, comprising 39 per cent of world container tonnage, is the world's largest. As of mid 1971:<sup>1</sup>

<u>Country</u>	<u>GRT (1,000s)</u>	<u>% Gain from Mid-1970</u>
United States	1,067	24
United Kingdom	627	67
Japan	353	52
Germany	326	101
Liberia	79	325
Norway	69	unavailable
Sweden	60	unavailable

Containerized shipping has also brought about a new role for the North American land mass, but in this instance expected legal difficulties have not emerged. America was discovered because it blocked what had been hoped was a direct route to India, and subsequent explorers searched for a through "Northwest Passage," only to fail until the SS Manhattan forged through the Canadian icepack. Containerization has put the continent in a new light - that of a "land bridge" in the European to Asian trade routes. The idea is simple: ship

<sup>1</sup> "Containerships Hold Lead As Fastest Growing Single Type On High Seas," Container News, Vol. 8, No. 1, (January 1973), p. 20.

goods to North America by ocean, then across the continent by rail or truck, and continue via ship until final destination. The ease of loading and offloading containers has made this practice economically feasible.<sup>1</sup>

The expected legal difficulty, in customs, has failed to develop, at least in the United States.<sup>2</sup> The purpose of customs is to see that all goods are declared, all prohibitions and restrictions are observed, and that the correct duties are collected. While the use of containers means more difficult access for inspection and thus an increased possibility of smuggling, the sealed container provides greater physical security and often a superior system of documentation, aiding customs officials. Use of the TIR - Transportation Interchange Receipt - permits sending containers directly across the North American land bridge and onto awaiting ships. In this case, the legal apparatus regarding customs has been flexible and responsive enough to allow, with small modification, successful implementation of the new concept with a minimum of disruption.

One disruption that has developed has been an excess of carrying capacity, resulting in rate wars during which numerous illegal incidents are alleged to have occurred and which culminated in a revenue pooling agreement that is strongly questioned by the Department of Justice. The overtonnage problem, perhaps considered new, is instead recurrent through-

<sup>1</sup> Philip F. Van Pelt, "The North American Land Bridge, Where Are We - Who's Interested?", Container Services of the Atlantic 1970 (Washington, D.C.: 1970)

<sup>2</sup> Giles Morrow, personal interview held in NYC April 2, 1973.



out recent shipping history. Since the late 1880s, the supply of ships has often been ahead of the demand for carriage, which is a derived demand, and the industry response has traditionally been in one of two directions - all out competition of the most cutthroat variety, or shipping agreements, designed to assure each steamship company a share of the trade, transforming an oligopolistic structure into one best described as a limited monopoly.<sup>1</sup>

Under the former conditions, what are most aptly described as "rate wars" occur. The overcapacity problem was serious by 1971, as technology had surpassed the capacity of international commerce:

"Virtually overnight, the operators were faced with excess capacity, destructive competition, and depressed rates and rebating. They still had to pay off the costs of the new ships, containers, and shore facilities. On top of that, they had to take strikes over the very labor changes the new technology had made possible."<sup>2</sup>

Illegal practices such as absorption of land transportation costs, equipment costs, and rebating apparently became widespread. An inherently unstable condition, however, would not be left to its own. As in the past, a new arrangement was formulated to end illegal practices and put the industry on an even keel again.

Of the five types of shipping agreements: conference, inter-conference, transshipment, joint service, and pooling,

<sup>1</sup> Daniel Marx, Jr., International Shipping Cartels: A Study in Industrial Self Regulation by Shipping Conferences, (New York: Greenwood Press, 1969), p. 10.

<sup>2</sup> "Cooling the Rate War on the North Atlantic," Business Week, (April 29, 1972) p. 48.

the latter usually emerges, with a revenue pool most typical.<sup>1</sup> Net revenue is divided on the basis of past performance; the number and rotation of sailings are set, as are port allocations and servicings. Investigation into pooling agreements early in the century, conducted by Representative Joshua Alexander of the House Committee on Merchant Marine and Fisheries, led to the major US legislation in the field, the Shipping Act of 1916. The Alexander Report, despite the strong trust-busting climate prevailing, concluded that agreements within the shipping industry were effective and necessary measures.<sup>2</sup> Article 15 of the Shipping Act authorizes the Federal Maritime Commission to exempt from anti-trust action certain arrangements duly filed with and approved by the Commission. Broadly, the FMC will authorize proposed agreements, unless they are 1) unjustly discriminatory against shippers, carriers, exporters, importers, or ports; 2) detrimental to US commerce, or 3) contrary to the public interest.

The American legal tradition is distinct from the European, and both the Department of Justice and the Department of Transportation have strong reservations about revenue pools, practical experience and Article 15 of the Shipping Act notwithstanding. Although US carriers would be granted 55 percent of the North Atlantic trade, the anticompetitive possibilities produce a reflex action from certain branches of the Federal Government. Europeans, accustomed to conduc-

<sup>1</sup> Daniel Marx, Jr., International Shipping Cartels, pp. 137-157.

<sup>2</sup> John J. McDonnell, "Unilateral Regulation of International Trade," Journal of Maritime Law and Commerce, III, 794.



ting business in a different legal environment, view the US as quaint:

"Overcapacity looks to continue as the industry's biggest internal headache, and significantly, the key politics remain in trades where US regulatory policies exert their peculiar and controversial influence. In the North Atlantic the major carriers still await FMC approval for a re-tuned revenue package that appears less discriminatory towards US ports."<sup>1</sup>

This issue is pending before the FMC in Docket 10,000, the decision of which will have as much impact on the industry as any case yet adjudicated.

Another facet of the overcapacity/pooling controversy is the development of feeder systems and the servicing of ports, along with resulting dislocations. Since one containership can conduct the trade of  $4\frac{1}{2}$  conventional break-bulk liners, the issue of port services has been raised.<sup>2</sup> Given adequate feeder systems, the principal ports - New York, New Orleans, San Francisco, Los Angeles, and Seattle - are sufficient to handle all the containerships needed for international trade. This relegates the regional ports such as Boston, Philadelphia, and Norfolk to lesser importance.

Several legal points, such as US restrictions on foreign shipping, the type of vessel arrangements, considerations of equalization and absorption, as well as basic jurisdictional questions within the Federal Government, arise in the feeder issue, also before the FMC in Docket 10,000. Joining DOT

<sup>1</sup> "Containerisation 73: the big swing to politics," Containerisation International and Unit Transportation, XII, No. 6 (December 1972), p. 18.

<sup>2</sup> Edward Schneltzer and Edward J. Shepard, "Container Feeder Systems," Journal of Maritime Law and Commerce, IV No. 2 (January 1973), p. 216.

and DOJ, the port authorities of Massachusetts, Maryland, Delaware, and Virginia have gone on record as opposing the pooling proposal from fear of greatly reduced business.

The cabotage laws of the US prohibit foreign flag vessels from operating between proximate US ports. Whether the feeder vessels (barges) will be owned by the steamship line, chartered, or provided by a common carrier, affecting insurance and liability, is involved in the larger question of intermodal liability to be discussed later in this paper. The possibility of absorption of feeder costs, although held illegal in *Sea-Land Service, Inc. v South Atlantic and Caribbean Lines*, 9 FMC 338, 344 (1966), has obvious anticompetitive implications and presents a serious regulatory problem to the FMC. In addition,

"Port equalization violates Section 16 of the Shipping Act where 1) it diverts traffic from a port to which the area of origin is naturally tributary, and 2) it is not justified in the shipper's interest, by lack of adequate service at the port from which traffic is so diverted."<sup>1</sup>

Development of LASH and SEABEE systems, which use barges for collection and distribution, make this a matter requiring urgent attention. The issue of port services and feeder systems

"...presents a serious problem to those ports being denied direct vessel services, and to the Commission which has the statutory obligation to protect ports from unjust discrimination and, at the same time, insure the welfare of our commercial, oceanborne trade."<sup>2</sup>

<sup>1</sup> *Ibid.*, 218.

<sup>2</sup> Federal Maritime Commission, Tenth Annual Report(1971), p. 15.



Though it would seem that this is a reasonable assessment, legal difficulties are being created, not solved, by the organizational and jurisdictional structure within the United States Government itself. Competing and divided jurisdiction is the heart of the issue, for, over much of this aspect of maritime trade, the FMC does not have purview. Truck and rail feeder systems are regulated by the Interstate Commerce Commission, and regulatory powers have been extended to waterborne feeders using function, not form, as the guide. The FMC has power only if domestic offshore islands such as Puerto Rico or foreign ports are involved in collection and distribution. The philosophy of the agencies can be sharply different, and, as containerization of air shipments becomes practical, the Civil Aeronautics Board enters the picture. The fault lies not with any agency per se, but is due to the lack of a single regulatory body with control over all modes of transportation. While containerization has accentuated some legal difficulties it has created this last - the need for intermodal jurisdiction. Here action at the Federal level is clearly needed.

## Procedure

A separate category apart from the implementational phase is the procedural phase of containerization. The physical capability of a container system, expressed as implementation, preceded the development of a suitable methodology, legal and otherwise, for running the system. This is still evident, as the container industry, faced with the reality of large containerships presently in service, strains to devise adequate management procedures. Lack of documentation procedures is one of the most formidable barriers to efficiency, and the shipping industry stands to make substantial savings in this area. The crux of the problem is devising methods of documentation that can operate economically in a twentieth-century time frame while meeting strict legal criteria.

The technology to produce faster, more reliable containerships has made the time issue important, and the enormous amounts of cargo carried in containers compounds the problem, for the larger volume of goods means much more paperwork to process in a shorter time.

"Although containerization, and its rapid growth, did not create the demand for a standard format, it certainly highlighted the advantages that such a format would provide. The simplified operations and the intermodal nature of container shipments made all the more apparent the need for a standard format that would be completely intermodal as well as international."<sup>1</sup>

Transatlantic transit time for a modern containership is on the order of five days or less, with great dependability of

<sup>1</sup> Arthur E. Baylis, "The Standard Shipping Format - A Guide To Simplified Documents," Journal of Maritime Law and Commerce, II (1970), p. 402.



departure and arrival. The traditional system of producing and mailing shipping documents ahead is sadly outmoded in the container age. Companies that can transmit the required documentation ahead of the ship to allow for processing before landfall may expect to obtain a major competitive advantage, not only in view of superior service but by reducing costs of terminal warehousing and insurance.

Besides these benefits, documentation procedures that provide necessary information in standard format and eliminate overlap and redundancies peculiar only to one facet of intermodal transportation will realize substantial savings in preparation costs. Matson researchers, examining a typical folder of documents for one internationally-bound containerload, found 66 pieces of paper.<sup>1</sup> This cost of documentation runs into billions of dollars annually, and has been estimated to be between 8-10 percent of the cost of international trade.<sup>2</sup> While there should be strong incentive to standardize procedures, this development was slow in coming:

"...shipping companies have always been interested in technical innovations that would result in obvious improvements, such as reduced fuel consumption, increased speed, or reduced crew requirements. However, until recently their interest in innovations has been centered primarily on improvements in the dock to dock transportation system and not in the shipper to consignee transportation system."<sup>3</sup>

Realizing the long lead time for action at the Federal

<sup>1</sup> Matson Research Corp., The Impact of Containerization on the US Economy, p. 84.

<sup>2</sup> John R. Immer, Container Services of the Atlantic 1970, p. 13.

<sup>3</sup> National Academy of Engineering, Toward A Fulfillment of A National Ocean Commitment (Washington, D.C.: National Academy of Sciences Printing Office, 1972) pp. 43-44.

and international levels, the shipping industry formed the NCITD (National Committee on International Trade Documentation) to expedite uniform methods and reduce paperwork. NCITD, in conjunction with DOT's Office of Facilitation and the San Francisco Marine Exchange, devised the US Standard Master for International Trade, computer-compatible with the ECE layout key, that was accepted for use in June, 1970. It has been estimated that use of the Standard Master will save up to 25 percent - or \$500,000,000 - of documentation costs per year.<sup>1</sup>

A main objective of standardized documentation has been to provide a "through bill of lading," a document that functions as a contract of carriage, a receipt for goods, and a certificate of title that may be used in shipper to consignee transport, regardless of the number of transport modes utilized. Certain other parties besides the shipper, carrier and consignee have vital interests that must be accommodated in this area, notably insurance companies and financial institutions such as banks. The significant effort in producing a standard through bill of lading has been the TCM Convention, not in force. Being primarily a liability convention, the TCM will be discussed in that section of this paper.

In establishing procedures to accommodate containerization, several important adaptations have been made, at times running directly counter to both maritime law and custom. While many of the cases have been taken to court over the is-

<sup>1</sup> Arthur E. Baylis, "The Standard Shipping Format," P. 412.



sue of determining liability for loss or damage to in a specific case, a fundamental restatement of permitted practices has been required that have been vital to the continued use of containers, and demonstrate how the legal fabric must be flexible in dealing with new problems. This flexibility has been provided by the courts.

For example, doubt existed as to what precisely a container was, and the legal role it played in shipping. In domestically implementing the 1924 Hague Rules, the Carriage of Goods by Sea Act (COGSA, 46 USC 1300 et seq) places a limit of \$500 per package on the carrier. In break bulk shipments, a "package" is easily identified; but what legal standing has a 20' X 40' container, filled with dozens of cartons unseen by the carrier, and whose average worth is \$12,000? Freight rates, the amount of due care exercised to prevent loss and damage, and the separate need for cargo insurance by the manufacturer/shipper depend on whether or not a sealed container is, for COGSA purposes, a "package."

The definition of a package in the container era may be traced through three court decisions. In the case of *Inter-American Foods v Coordinated Caribbean Transport*, 313 F Supp 1334 (1970), the Fifth Circuit Court of Appeals held that each "master carton" of shrimp signed for by the carrier, although containerized, constituted a package, and not the "one trailer load" stated on the carrier-issued bill of lading. The court noted that in the absence of identifiable units,

the customary freight rate, in this instance per hundred-weight, would determine the number of packages for liability purposes.<sup>1</sup>

Perhaps the best-known case, *Leather's Best, Inc. v Mor-maclynx* (read: Moore-McCormick Steamship Lines M/V LYNX), 451 F 2d 800 (2d Cir 1971), upheld the finding that the carrier's receipting for individually-wrapped or baled articles makes each a package, and furthermore defined the purpose of the container itself by holding that they are transportation equipment, not merchandise or packing; being part of the ship, containers are provided primarily for the convenience of the carrier. However, the *Kulmerland* case, 159 A.M.C. 1995 (S.D.N.Y. 1972), involving 350 adding machines not specifically enumerated on the bill of lading, found that the container was a package for COGSA determination.<sup>2</sup>

The overall guidelines suggest, then, that only where the container is provided and packed by the shipper without specifically listing the contents will the entire container be subject to the \$500 COGSA limitation. If the carrier knows the contents, each unit within the container is a package, regardless of who provides the container. And, if the container is supplied by the carrier, it is a fundamental part of the ship, and he will be held responsible for the items inside, whether or not enumerated by the shipper.

Another issue decided, again for liability determination

<sup>1</sup> "Where Carrier Issues Receipt for Each Carton Placed in its Freezer Trailer at Inland Point, and Later Issues Bill of Lading Each Carton, Not Trailer, is COGSA 'Package.'", Journal of Maritime Law and Commerce, II (1970-1971), pp. 338-340

<sup>2</sup> "Shipper's Sealed Container Constitutes COGSA 'Package' Where Contents Not Enumerated," Journal of Maritime Law and Commerce, IV, no. 2 (1972) pp. 159-164



but important in definitional and procedural aspects, was adjusting the legal regime to conform to new ship characteristics. A distinct pattern of accepted practices emerged after centuries of oceanborne trade, and an important one was the principle that goods be carried belowdecks. The incidence of water damage and loss overboard were substantially higher for items stowed on a vessel's weatherdecks, and it became customary to assume that cargo would be stowed in the hold. This was a condition for a "Clean" bill of lading, one issued with no qualifying paragraphs added to the standard printed form.<sup>1</sup> Serious difficulties are encountered in "un-clean" bills of lading, which indicates that some sort of restriction is in force, or that accepted practices have not been followed. Receipt for goods, insurance, freight payment, and the negotiability of the ocean bill of lading itself all come under question in where the bill is anything other than "clean."

Deck carriage, which made a bill of lading "un-clean," came to constitute an "unreasonable deviation," a term that originally meant an unwarranted change of geographic course that increased the risk to the ship, crew, and cargo but over the years was widened to mean other acts that increased risk. Insurance contracts do not cover goods lost or damaged because of unreasonable deviations, but specialized attention to certain goods and safety regulations have changed traditional stowage practices. Containerships are designed and built to carry cargo above the level of the main deck as well as in

<sup>1</sup> Durward L. Brooks, "Exporting Without Tears," VI: The Ocean Bill of Lading, Transportation and Distribution Management, XII No. 11, (November 1972), pp. 52-53.



the cellular hold. Refrigerated cargo, for instance, is carried on deck, where temperature is easily monitored. Numerous rules of safety now designate specific areas above deck for the stowage of "red label" items such as explosives. But, to what extent on-deck stowage was an unreasonable deviation creating an unclean bill of lading, as well as what vessels should be classified as containerships, were questions left to the courts for determination.

In *Encyclopedia Britannica v The Hong Kong Producer*, 442 F 2d 7 (2d Cir 1969), while on-deck stowage on a break bulk vessel was reaffirmed an unreasonable deviation, the court hinted that, if a loading port custom could be established, then on-deck carriage of containers would be permissible.<sup>1</sup> This important ruling legitimized modern practice, and has led to a much-needed restructuring of the law. The first containerships did not appear overnight, but followed an evolutionary process described earlier. The fact that the M/V Hong Kong Producer, a break bulk, was denied deck carriage did not address the status of the intermediate links between it and the newest containership afloat. Many ships had been modified to handle containers while retaining many break bulk characteristics.

Deciding *DePont deNemours International v The Mormacvega* (read: Moore-Mac VEGA), 1972 A.M.C. 2366 (S.D.N.Y. 1972), the doctrine of proximate cause was invoked to determine liability. It was held that the result of conversion to container capability was identical to designing a new containership from

<sup>1</sup> J.P. McMahon, "On Deck Stowage of Container on Containership Not Unreasonable Deviation," Journal of Maritime Law and Commerce IV, No. 2 (January 1973) p. 324.



the keel up, and that although only deck-carried cargo was lost overboard, and not cargo in the hold, the deck stowage was not an unreasonable deviation for a containership, converted or otherwise. The steamship line was held responsible for the loss, on the grounds of proximate cause; i.e., the carrier could not demonstrate the loss was not attributed to on-deck stowage. But, significantly, DePont's claim that a clean bill of lading called for hold storage was disallowed.<sup>1</sup> Established was the status of a large number of ships and substantiated was the change, due to present-day ship design, of a centuries-old maritime practice regarding stowage.

Procedural development of containerization has also resulted in a need for an important segment of the shipping industry to adapt or face extinction. The ocean freight forwarder's value to the exporting industry came about due to the increasingly complicated laws and regulations of international trade. As an intermediary between the shipper and the carrier, the ocean freight forwarder performs numerous services. He advises on port and ship availabilities, capacities, and schedules; consolidates LCL (less than containerload) cargo; prepares shipping papers such as export declarations, dock receipts, delivery orders, and consular invoices; arranges for special handling; expedites and coordinates transfer to and from inland carriers; and performs accessorial services for additional fees such as arranging insurance, local trucking, and warehousing.<sup>2</sup>

<sup>1</sup>

Ibid., 325.

<sup>2</sup>

Gerald Ullman, The Ocean Freight Forwarder, The Exporter, and the Law, (Cambridge, Md: Cornell Maritime Press, 1967) p. 2-3.



Although there are several types of freight forwarders, the ocean freight forwarder is generally located in the port area, and is in a unique legal situation: for tax purposes he is a local business engages in intrastate commerce, but is regulated by the FMC because of his dealings in foreign trade. Basically, the ocean freight forwarder is the shipper's legal agent, with power to decide what will be done, but not how or by whom. In order to conduct business, however, the ocean forwarder must often name himself as consignee, thereby becoming liable for loss and damage. Consolidating LCL shipments, warehousing, or insuring the shipper's merchandise to protect himself creates liability. As he is prohibited from being a carrier, and cannot have an interest other than as agent in the shipper's business, the ocean forwarder has been hurt by containerization:

"It appears that containerization is making inroads into the ocean freight forwarder's traditional port areas of operation and documentation of shipments. Intermodal transportation complexes are attracting greater amounts of small shipments direct from the factory to inland terminals, where such shipments are consolidated into container loads and moved by related inland carriers to port. Thus, many exporters no longer find it necessary to deal directly with ocean freight forwarders to arrange for factory-to-port movements by separate intermediate carriers. In addition, some intermodal complexes provide some or all of the necessary documentation, thereby eliminating the basic services traditionally provided by ocean freight forwarders."<sup>1</sup>

It is not surprising that intermodalism has reduced the need for the ocean forwarder. Giant corporations such as Sea-

<sup>1</sup> Federal Maritime Commission, Tenth Annual Report, (1971), p. 40.



Land and Sea-Train, physically able to handle shipments from factory to buyer, should be able to handle the administration. Ocean freight forwarders make money in two ways: from a fee paid either by the shipper or consignee, and from a commission based on a percentage of the freight bill, called compensation, paid by the selected carrier.<sup>1</sup> While the ocean freight forwarder cannot be a carrier, his position may be eliminated by a carrier assuming his duties. Thus the statement of Jerry Chambers, 1972 President of the Freight Forwarders' Institute: "I do not believe the freight forwarding industry has ever been in the critical situation that it finds itself in today."<sup>2</sup>

<sup>1</sup> Gerald Ullman, The Ocean Freight Forwarder and the Law, p. 70.

<sup>2</sup> Jerry Chambers, "Shippers Need Forwarders, Forwarders Need Help," Distribution Worldwide, (February 1973), p. 49.

## Liability and Insurance

Intermodalism as brought about by containerization has had fewer apparent affects on the financial aspects such as insurance and liability than on implementational and procedural features. The impact, more subtle and complex, requires separate attention. Maritime law in general and marine insurance in particular are fields that many lawyers anxiously avoid, apparently due to major variances in jurisdiction and application. In transportation of goods, the interests of the property owner may not be consistent with the desires and practices of the carrier and vice versa; when adjudication of loss and damage claims arises, manufacturers and transporters often forget that each is nothing without the other and become bitter adversaries.

In discussing this complicated topic, it is perhaps best to examine the basic guidelines, before going to specifics and countervailing arguments. Recognizing the special risks involved in ocean transportation, concessions have been made to encourage international trade. Producers, shipowners, and insurers alike operate under a set of rules in ways significantly different from those applicable to more conventional undertakings. In considering responsibility, which is what liability and insurance are all about, it is important to remember that there are three parties involved: the manufacturer, the carrier, and the underwriter. As used in this paper, "shipper" refers to the person who ships, the factory owner; not the party who performs the physical act of shipping, who is the carrier.

The standard Lloyd's Policy, in use for some 350 years,



is the classic work of marine insurance. It assumes three implied warranties on the part of the carrier. The vessel is assumed seaworthy - adequately constructed, manned, equipped, and properly stowed. Second, there will be no deviation without cause: the insured has no right to substitute a different voyage, and hence different risks, from those already insured, unless it can be demonstrated that the deviation lessens risk, as in avoiding a storm or capture. As noted, deviation has come to include other practices, rather than being bound in a geographic sense. Third, the Lloyd's Policy assumes that the voyage does not contemplate or constitute a violation of the law.

A ship is insured separately from the cargo loaded into it because there is a division of ownership. The carrier, of course, must carry hull insurance to protect his vessel. It also behooves him to protect himself in the event the cargo, which is not his, is lost or damaged. This requires third party insurance, as it covers the liability of the carrier to a third party, the shipper.<sup>1</sup> Generally, four types of insurance are available to the carrier: open cargo insurance, where the shipper has not insured his merchandise; limited cargo insurance, covering the carrier up to the bill of lading value; terminal insurance, for warehousing; and insurance for damage caused by the container.<sup>2</sup> This third party insurance is known as P&I (protection and indemnity) but is little used in the

<sup>1</sup> Irwin M. Taylor, The Law of Insurance, (Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1968), pp. 76-84

<sup>2</sup> Matson Research Corp., The Impact of Containerization of the US Economy, p. 82.



US as line operators feel that the cargo owner should be responsible for the insurance of his own property.

The shipper, meanwhile, has the option - really the necessity - of general cargo insurance. Protecting his own interests, and naming himself beneficiary, he thus acquires first party insurance. Eighty percent of cargo losses come under three categories: theft, including pilferage, hijacking, and non-delivery; breakage, during handling and stowage; and water damage from salt water spray as well as fresh water condensation.<sup>1</sup> All these usually occur after the goods have left the factory, so it is not surprising that shippers believe that the risks, meaning the insurance costs, should be assumed by the transporter; they feel the insuring of goods from <sup>the</sup> warehouse an unfair burden. Carrier liability, they assert, would place the incentive of due care where it belongs.

Completing the triangle is <sup>the</sup> marine underwriter, a product of the peculiar environment of admiralty law and jurisdiction. Although following many rules of insurance, he has certain doctrines available that lend eccentricity to ocean endeavors. Besides the three implied warranties of seaworthiness, deviation and legality of voyage, the insurer may restrict coverage by invoking several principles. The doctrine of proximate cause permits liability, and therefore payment, only for loss arising from violent, immediate, and unexpected actions; factors such as everyday phenomena and loss due to wear and tear are not covered. And, the link between cause and event must

<sup>1</sup> Alvin S. Roberts, "Cargo Insurance - Make Your Own Rates," Distribution Worldwide, (May 1971) pp. 51-55.



be close and direct: if cause is remote, recovery is denied. The law of particular average requires that losses of a particular property owner, innocently involved, must be compensated from the holdings of other property owners who did not suffer losses in the same venture. Under particular average, the owner of cargo jettisoned to save a ship must look to those whose goods were saved, rather than the underwriter. The sue and labor clause requires property owners to expend every effort to save and protect their goods, although they are compensated whether or not their efforts are successful.<sup>1</sup> It seems here that the sue and labor clause requires property owners to make more than "reasonable" or "prudent" efforts in order to collect.

Furthermore, an unfortunate result of the carrier/shipper separation has been a certain amount of redundant insurance. The carrier, especially in the container age where the value of cargo is significant, must procure specific coverage for third party insurance. The shipper, aware of the differing limits of liability for the various modes of transportation to be used, must obtain through insurance. The result is an overlap that works to the advantage of the underwriter, who can receive two fees to insure the same merchandise. Insurers vigorously deny that double coverage exists, justifying present practices by correctly stating that no party will recover more than the amount of the loss. Nonetheless, the division of risks and need for separate policies result in a duplication of costs, to say nothing of the commissions, that does not seem justified.<sup>2</sup>

<sup>1</sup> Irwin M. Taylor, The Law of Insurance, p. 81.

<sup>2</sup> Eugene A. Massey, "Prospects for a New Intermodal Legal Regime: A Critical Look at the TCM," Journal of Maritime Law and Commerce, III, p. 752.



Although it is quite possible to be paid twice for coverage, the insurer's rules of recovery are similarly modified. For example, in repairing a damaged ship, insurance companies pay only two-thirds of the actual repair costs, the theory being that the new materials make the vessel much more valuable, and therefore the owner should share the cost of the increased benefit. Two loss classifications are used: something may be declared an Actual Total Loss (ATL), when it is completely destroyed; recovery is clear and absolute. Not so for the Constructive Total Loss (CTL), defined as where a prudent owner would abandon the property as not being worth the cost of repair. Circumstances warranting CTLs are a matter of sharp dispute, but even immediate danger of ATL is not sufficient and, upon collection, title of the remnants passes to the insurer.<sup>1</sup>

The full affects of containerization upon liability and insurance have yet to arrive, but tendencies have begun to appear. The issue of liability is of great concern to all parties, especially the underwriters; cargo insurance recovery rights are subrogated from the shipper to the insurer for recovery against the carrier, that is, under subrogated rights, it is up to the insurer to take the carrier to court, rather than the shipper having to initiate judicial proceedings. The function and benefit of insurance are that they provide distribution of risk, but an undesired yet commonplace side affect is reduced effort on the part of the insured to reduce losses.<sup>2</sup>

The insurance industry maintains that containerization com-

<sup>1</sup> Irwin M. Taylor, The Law of Insurance, p. 83-83

<sup>2</sup> John R. Immer, Container Services of the Atlantic 1970, p. 19.



pound difficulties in pursuing subrogated claims.<sup>1</sup>

Presumably, the container revolution has hindered these settlements because of difficulty in affixing responsibility for damages incurred in transit. Without inspection at each mode interface, it is commonly held that liability for damage cannot be placed. Yet the time and expense of several inspections per container would largely negate the advantages of intermodal transport. Despite the positions taken by interested parties, it appears that far too much commotion is being made over this aspect of damage and liability, and certain facts are being ignored in favor of conjecture and speculation regarding hypothetical and improbable cases. At the very worst, container losses are equal to break bulk, but may be assumed to be significantly better. In Atlantic Container Lines' first year of operation, 15,000 containers were carried on deck, with none lost overboard and only five damaged by wave action. Container Express, Ltd. of London has gone for at least three years without an insurance claim. United Cargo Corporation, a worldwide service, does not even have a claims department.<sup>2</sup> And the British seem to be on the right track as far as hidden damage goes:

"The key is external damage. If the container is in possession of a carrier and is signed for as being in good condition but is released with visible proof of external damage, then there can be no question of the carrier's responsibility. If the cargo is damaged and the container bears no evidence of external damage, then the responsibility rests with those who loaded the cargo."<sup>3</sup>

<sup>1</sup> Eugene A. Massey, "A Critical Look at the TCM," p. 751

<sup>2</sup> John R. Immer, Container Services of the Atlantic 1970, pp. 46-53

<sup>3</sup> Containerisation International 1970 Yearbook, p. 155.



Regardless of the merits, the shipper versus carrier battle is an old one that will continue into the container age and beyond. Many in-transit losses are due to poor packing by the shipper, and most carrier-caused damage could have been avoided. The issue is complex, and disagreement among experts prevails. The transport industry, currently with the advantage, fears having to insure a fully-loaded containership, especially if a system of strict liability with high limits were imposed. The industry visualizes several carriers, each handling the shipments of a single manufacturer, as thus having the same insurance rates, and correspondingly reduced incentive to prevent loss and damage, in addition to being unresponsive to shipper needs. Increased freight rates, litigation costs, insurance rates, as well as collection delays and the need for the cargo owner to insure specific areas of exposure are the predicted results of high-limit carrier liability.<sup>1</sup>

From the shipper's vantage point, strict carrier liability is seen as a definite incentive to good performance, with the prospect of obtaining lower premiums through claim-free service; although in practice large shippers get individual rates and fast claim settlement.<sup>2</sup> Citing strict liability as an emerging trend, shippers believe that insurance should be the responsibility of the party who is in the best position to allocate the risks of the activity, and this, of course, would be the carrier.

<sup>1</sup> Carl E. McDowell, "Containerization: Comments on Insurance and Liability," Journal of Maritime Law and Commerce, III (1972), p. 508, p. 511.

<sup>2</sup> Eugene A. Massey, "A Critical Look at the TCM," p. 738.



A change from the present system to one of strict carrier liability would be a monumental change in the law of insurance, and, if it comes about, containerization will have been responsible for making it happen.

As containerization fuels the debate between shipper and carrier, it has also shown the need for truly intermodal jurisdiction. Just as separate ownership of cargo and ship complicates insurance, divided regulatory power over various methods of transportation has become woefully inadequate. Under both domestic and international legal regimes, the ocean carriers come out well when compared with other types of carriers. Use of different modes means a shift in liability along with differing rights, remedies, and responsibilities, and the separate but unequal legal structure can only act as an impediment to international trade.

Domestically, intermodal jurisdiction of a sort has been achieved by the ICC, which regulates all inland surface transport. Responsibility is placed on the carrier, up to the value of the goods, unless the carrier is expressly permitted by the ICC to file a "released rate," limiting financial liability. In claims litigation the burden of proof is on the carrier, who is basically limited to third party defenses.<sup>1</sup> The European counterparts regulated by international convention due to the small size of the nations, are, for rail, the CIM, which puts a strict burden of proof on the carrier, penalties for delay, double indemnity for willful misconduct, and a

<sup>1</sup> John R. Immer, Container Services of the Atlantic 1970, p. 63



liability limit of \$15 per pound. European truckers are governed by the CMR Convention, fundamentally the same as the CIM, with a limitation of \$3.70 per pound for loss and interest due on damage costs.

These laws do not apply to the ocean carrier, who operates under the 1924 Convention for the Unification of Certain Rules of Loss Relating to Bills of Lading, known as the Hague Rules. Implemented domestically as the previously-mentioned COGSA, it requires only that carriers exercise due diligence and permits some seventeen defenses: action or fault of master or crew; act or omission of the shipper; insufficiency in packing; inherent vice of the goods; latent defects; perils of the sea; fire; acts of God; war; public enemies; legal seizure; quarantine; strikes or lockouts not by the carrier; or any other cause without fault or privity of the carrier. The COGSA limit is \$500 per package and the burden of proof is on the claimant.<sup>1</sup>

Given the differing rules pertaining to each mode, it becomes apparent that a unification of regimes to provide for through passage of cargo with minimum disruption is urgently needed. The logical place to start is at home; as noted, the ICC regulates inland surface transport and the FMC ocean shipping, but Civil Aeronautics Board purview over domestic air cargo must be considered. The storage and lifting capabilities of 747 cargo aircraft have propelled aviation into the container age - the boldest venture being Atlantic Container Lines

<sup>1</sup> David M. Sassoon, "Liability of the International Carriage for Goods by Sea, Land, and Air: Some Comparisons," Journal of Maritime Law and Commerce, III (1972), pp. 759-773.



and American Airlines joining forces to provide "Sea Jet One," which flies containers over the North American land bridge.<sup>1</sup>

Much give and take among the regulatory agencies is required; jurisdictional battles always lurk just below the surface. The main impediment to successful intermodal regulation is basing jurisdiction on form rather than function; until this practice terminates regulation will lag behind reality. The ICC, for example, does not permit the filing of joint rates, intermodal rates involving two or more carriers, one ostensibly out of the regular jurisdiction of the ICC. However, the FMC recently amended General Order 13, permitting carriers under its power to file through rates unilaterally or jointly with carriers of other modes. The atmosphere is hopeful and expectant:

"Despite the continuing regulatory compartmentization of the unwieldy troika of the ICC, FMC, and CAB, there are hopeful signs that truly intermodal distribution systems are becoming available to shippers."<sup>2</sup>

Containerization has aggravated problems in placing liability and has demonstrated the urgent need for a uniform regulatory regime. Another pressing legal problem is that of a through bill of lading, a prerequisite for true intermodal transport. The ocean bill of lading is subject to the COGSA, but is issued by each steamship line, and usually contains conditions and exemptions from liability. Inland bills of lading have attained a much higher degree of uniformity.<sup>3</sup>

<sup>1</sup>

Advertisement in Container News, VIII, No. 1 (January 1973), 37.

<sup>2</sup>

John T. McCullough, "The Opportunities- Today and Tomorrow," Distribution Worldwide, (October 1972), p. 53.

<sup>3</sup> Durward Brooks, "Exporting Without Tears," Distribution Management, XII, No. 11 (November 1972), p. 52.



Shippers like the through bill of lading concept, many seeing it as a mechanism to attach liability to the carriers. Using a factory-sealed container for point-to-point delivery, the through bill of lading can reduce operational and paperwork costs, pilferage, and packing expenses.<sup>1</sup>

Any bill of lading, through or not, must fulfill three functions, as mentioned: serving as a contract of carriage, setting liability, a receipt for identified goods, and a negotiable document of title. Issues of liability and intermodal responsibility come again to the fore. Negotiability is based on legal responsibility, and thus the need for through liability. The lack of continuity in segmented journeys can defeat negotiability, a vital function of the bill of lading.<sup>2</sup> Time becomes a factor, as a negotiable bill of lading is less useful for financing as the delivery time of the goods is decreased. However, a through bill of lading including inland portions of the shipment would regain the utility lost to the fast containerships. Finally, paperwork reduction is not necessarily a result of containerization and intermodalism; although regulatory agencies, shippers, and bankers all favor a through bill of lading, one or more will object to eliminating a specific document already in use.<sup>3</sup> If the through bill of lading becomes merely one more piece of paper added to the pile, a great opportunity for savings and efficiency will have been lost.

<sup>1</sup> Gerald Ullman, The Ocean Freight Forwarder, The Exporter, and The Law, p. 38.

<sup>2</sup> Eugene A. Massey, "A Critical Look at the TCM," p. 732.

<sup>3</sup> John R. Immer, Container Services of the Atlantic, p. 14.



The major attempt to solve these problems has been the TCM (Transport Combine' de Merchandises) Convention. Fundamentally a liability convention, the TCM's purpose is to standardize the legal regimes that presently constitute intermodalism. Tracing its beginnings to the 1956 UNIDROIT Conference, the topic was promulgated as the ECE's "Rome Draft" in 1970, which was modified the next year in IMCO/ECE meetings. The impetus and driving force, naturally, has been containerization.

The TCM would place liability on a CTO (Combined Transport Operator), who would be either a carrier or a freight forwarder. The CTO would issue a Combined Transport (CT) document, or, in other words, a through bill of lading, that is favored by the manufacturing and banking communities. The most confusing and controversial part of the TCM, however, is that area it was designed to correct: liability, which is divided into two subject areas - known-mode damage and hidden damage discovered at destination. For the latter, the CTO would call upon Article 9 of the TCM to provide four defenses: fault of the shipper or consignee, inherent vice of the goods, force majeure, and due diligence. But where damage can be attributed to a specific transportation mode, the "network" system of Article 12 takes over. Existing conventions, those already in force for ocean, international air, European road, and European rail, with differing characteristics and faults, would be used to determine the placement and severity of



liability.

For example, the CTO would be responsible for hidden damage unless he could successfully present one of the four carrier defenses. But, if it could be proven that loss or damage occurred during the ocean segment, the Hague Rules would apply. For damage incurred during air transportation, the Warsaw Convention becomes guiding, and so on. The CTO, without the network system, would have to insure each mode for himself and his subcarriers although this is what the shipper must do with the network system. Ocean freight forwarders, who cannot be carriers, would become insurance wholesalers under the TCM, but carriers acting as CTOs can use the fault liability defenses of Article 9, and would have an opportunity to put the ocean forwarder out of business.<sup>1</sup>

Opponents of the TCM are numerous, and it is questionable whether it will even enter into force. The United States is uncertain as to what the TCM will actually do, and wants strict liability instead of the proposed fault system. We also oppose the network system, unsure as to whether Article 9 or Article 12 would apply in certain circumstances, and feel that resorting to present conventions does not represent a new solution. Additionally, a jurisdictional battle is shaping up between the ICC and the FMC, each of which wants to regulate CTOs.<sup>2</sup> The airlines feel they were not given enough say in formulating the TCM's provisions, and LDC's view the convention as another method of keeping them sub-

<sup>1</sup> Eugene A. Massey, "A Critical Look at the TCM," p. 746-747.

<sup>2</sup> Giles Morrow, US Freight Company, personal interview held in New York City April 2, 1973.



ordinate to the current powers in world trade. It would appear, then, that the TCM may well be in the same situation as the Public Law and the Private Law drafted to combat oil pollution at sea - completed, with redeeming features, but not far enough for some groups, too far for others, and little chance of adoption.

## Concluding Remarks

The implications of the use of container are of great use to the United States and the rest of the world. In placing new emphasis on the ocean segment, this quantum technical advance has accelerated the shift in world trade determinants from production capacity to distributional services provided. This has been accomplished by capital-intensive substitution over, or in spite of, major obstacles in the fields of land and labor.

The US has regained much of the lost carriage trade by being the recognized leader in container development and use, the negative import-export balance of 1972, the first time in the red for this country since 1888 or so, stands to be reversed through increasing utilization of the world's largest container fleet. This reversal will only be made, however, with careful and realistic government regulation, not overreaction to overcapacity, rate wars, and proposed pooling agreements. Regulatory decisions will have to be reached on the merits of the case, and not as an automatic reaction designed to protect "free competition."

The Federal Government must similarly act in a thoughtful manner cognizant of the new role of the continent as a land bridge, mindful of Canadian competition, and with the welfare of the nation of a whole placed above temporary dislocations incurred through changes in port servicing. The question of intermodal jurisdiction should first be settled on the home front, to present a position of leadership in this area as well as in other container-related ventures. The combination of FMC, ICC, and CAB is not conducive to effective regulation; it



is my contention that jurisdiction should be decided on a functional basis. US Freight's Mr. Giles Morrow suggested that the ICC control exports, the FMC control imports; this is structured along function, not form. An argument may be made for one agency having purview over all modes of transport, but in any case, freely available joint rates administered within an intermodal context is urgently required.

Both industry and government must catch up with the container age; redundant documentation, wasteful of time, talent, and money, is a prime target for efficiency-improving measures. Sophisticated computer techniques and satellite telecommunication systems should be used to the utmost to reduce paperwork and streamline procedures for truly required documentation. Work is needed at the Federal level, also: much of the paperwork is generated in response to government-imposed regulations. Through legislation and the courts, the government must shoulder the burden of redefining and restructuring the legal environment to reflect the realities of modern containership operation. Of all the legal disciplines, maritime law may be the most tradition-bound and one of the slowest in response; a united effort from all concerned will be needed to catch up with the present.

Containerization will not end the war of liability. Underwriters maintain that claims and payments are at an all-time high, despite the available evidence; insurance rates have not gone down and give no indication of doing so. Close investigation is needed to determine if shippers and carriers are correct



in their contentions that rates should be lowered; it is tempting to compare marine underwriters with their landlocked counterparts who make dire predictions of soaring premiums under proposed systems of no-fault automobile insurance, practical experience to the contrary. This temptation, however, may be an unfair combination of guilt by association and trial without jury. Nonetheless, I believe the matter should be examined closely and thoroughly by an impartial body.

It also appears that the carriers, like it or not, are going to become the recipients of liability, eventually losing the private war that goes on between them and the shippers. Court decisions defining the role of the container, the growing consumer movement, and a realization of the favorable position of the ocean carrier compared to operators of other transport modes (who currently are given the burden of liability) will place the responsibility where it belongs - on those who are in a position to affect the degree of risk taken or damage incurred - the ocean carrier.

Likewise, if there are substantial savings to be had, either through reduced insurance rates or economies achieved through containerization, rate structures should be adjusted accordingly. While it is naive, I'm afraid, to expect reductions to be "passed on to the consumer," I feel that rates accurately representing any lowered costs of the ocean venture would act as an incentive for international trade and improve the competitive posture of the US shipping industry. Just as it has used technology and capital, containerization, by using freight and insur-



rates as a mechanism for enhancing trade, can in another way provide genuine benefits for modern society.



## SELECTED BIBLIOGRAPHY

### Magazines

- "A Showcase For Integrated Transport." Business Week, November, 1971.
- "Atlantic Container Line Forms Air Charter Brokerage Firm." Maritime Reporter and Engineering News, February 15, 1973, p. 36.
- "Barge Carriers Bid For Lost Sea Trade." Time, March 15, 1971, p. 75.
- "Barges That Go To Sea in Ships." Business Week, August 7, 1971, pp. 74-5.
- Barrett, Colin. "The Theory and Practice of Carrier Rate-Making: Collective Rate-Making, Regulation and the Zone of Reasonableness." Transportation and Distribution Management, November, 1972, pp. 48-51.
- Boynes, Jane. "Combi Barges Ahead." Containerisation International and Unit Transportation, December, 1972, pp. 46-7.
- Brooks, Durward L. "Exporting Without Tears: The Ocean Bill of Lading." Transportation and Distribution Management, November, 1972, pp. 52-3.
- Carette, Edouard R. "Intermodal Concepts for Total Physical Distribution." Container News, Dart Containerline Supplement, p. 14.
- Chambers, Jerry. "Shippers Need Forwarders, Forwarders Need Help." Distribution Worldwide, February, 1973, pp. 49-52.
- "Containerships Hold Lead as Fastest Growing Single Type on High Seas." Container News, January, 1973, pp. 20 and 38B.
- "Cooling the Rate War on the North Atlantic." Business Week, April 29, 1972, pp. 48-52.
- Dickson, James M. "Pooled Shipments." Distribution Worldwide, October, 1972, pp. 97-8.
- "Edwin M. Hood Urges Greater Coordination of Shipping Policies." Maritime Reporter and Engineering News, February 15, 1973, p. 22.
- "FMC Sees Regulation as Tool to Developing Foreign Commerce." Traffic Management, November, 1972, p. 19.
- "Freight Rates Foundering." Time, August 9, 1971, p. 59.
- Hodd, Malcolm, Ed. "Containerisation 73: The Big Swing to Politics." Containerisation International and Unit Transportation, December, 1972, pp. 18-21.



- Hutcheson, James. "Speeding Paperwork." Container News, Dart Containerline Supplement, p. 26.
- Kahn, Richard H. "Forwarding Container Incentives." Aviation Week and Space Technology, February 22, 1971, pp. 40-2.
- "Loss Claims Payments Reports Indicate About Half of Losses Are Crime Related." Traffic Management, December, 1972, p. 7.
- "MarAd Approves Prudential-Grace Lines' LASH Ship Sale Plan." Maritime Reporter and Engineering News, January 1, 1973, p. 10.
- "McAllister Towing Inaugurates Container Barge Service." Maritime Reporter and Engineering News, January 1, 1973, p. 22.
- McCullough, John T. "The Opportunities - Today and Tomorrow." Distribution Worldwide, October, 1972, pp. 51-4.
- McKinlay, A. H. "Pinpointing Loss and Damage." Distribution Worldwide, March, 1972, pp. 56-60.
- "Memorandum to a President." Dart News, December, 1972, p. 21.
- "News Highlights." Traffic Management, December, 1972, p. 7.
- Penn, Stanley. "Waterfront Crime: Thievery on the Piers is Rife, but Everyone Blames Someone Else." Wall Street Journal.
- "Robert J. Blackwell Predicts Bright Future for United States Shipbuilding." Maritime Reporter and Engineering News, January 1, 1973, p. 12.
- Roberts, Alvin S. "Cargo Insurance - Make Your Own Rates." Distribution Worldwide, May, 1971, p. 51-5.
- "The Changing Ways of Export-Import." Handling and Shipping, The Magazine of Physical Distribution and Management, March 1965.
- "Traffic Trends and the Economy." Traffic Management, November, 1972, p. 14.

#### Books

- Federal Maritime Commission. Decisions of the FMC. Washington: US Government Printing Office, 1969.
- Marine Board of the National Academy of Engineering. Toward Fulfillment of a National Ocean Commitment. Washington: National Academy of Sciences, 1972.
- Marx, Daniel Jr. International Shipping Cartels: A Study in Industrial Self-Regulation by Shipping Conferences. New York: Greenwood Press, 1969.



Ullman, Gerald. The Ocean Freight Forwarder, The Exporter, and The Law. Cambridge, Maryland: Cornell Maritime Press, 1967.

#### Journals and Yearbooks

Baylis, Arthur E. "The Standard Shipping Format - A Guide To Simplified Documents." Journal of Maritime Law and Commerce, II, (1970-71), 399-412.

Bowman, Roy G. "The Merchant Marine Act of 1970." Journal of Maritime Law and Commerce, II, (1970-1971), 715-34.

Containerisation International, 1970 Yearbook. London: National Magazine Company, Ltd., 1969.

Immer, John R. Container Services of the Atlantic 1970. Washington: Work Saving International, 1970.

Kesterman, Frank. "Recent Findings on Containership Economics." Journal of Maritime Law and Commerce, IV, (January, 1973), 360-65.

Lyons, R.A. "Some Thoughts on General Average in the Container Age." Journal of Maritime Law and Commerce, II (1970-1971), 165-72.

Massey, Eugene A. "Prospects for a New Intermodal Regime: A Critical Look at the TCM." Journal of Maritime Law and Commerce, III (1972), 725-57.

McDonnell, John J. "Unilateral Regulation of International Trade: United States - Brazil Trade Example." Journal of Maritime Law and Commerce, III (1971-1972), 793-99.

McDowell, Carl E. "Containerization: Comments on Insurance and Liability." Journal of Maritime Law and Commerce, III (1972), 503-12.

McMahon, J.P. "On-Deck Stowage of Container on Containership Not Unreasonable Deviation." Journal of Maritime Law and Commerce, IV, (January, 1973), 323-26.

Sassoon, David M. "Liability and the International Carriage of Goods by Land, Sea, and Air: Some Comparisons." Journal of Maritime Law and Commerce, III (1970-1971), 759-73.

Scheltzer, Edward and Sheppard, Edward J. "Container Feeder Systems." Journal of Maritime Law and Commerce, IV, (January, 1973), 215-27.

"Shipper's Sealed Container Constitutes COGSA 'Package' Where Contents Not Enumerated in B/L." Journal of Maritime Law and Commerce, I, (October, 1972), 159-64.



- Simon, Seymour. "Admiralty Jurisdiction and the Liability of Wharfingers." Journal of Maritime Law and Commerce, III (1972), 513-36.
- Taylor, Irwin M. The Law of Insurance. Legal Almanac Series, XXXVII. Dobbs Ferry, New York: Oceana Publications, 1968.
- Van Pelt, Phillip F. "The North American Land Bridge - Where Are We, Who's Interested?" Container Services of the Atlantic 1970. Washington: Work Saving International, 1970.
- Ullman, Gerald. "The Role of the Ocean Freight Forwarder in In-modal, Containerized Transportation." Journal of Maritime Law and Commerce, II (1970-1971), 625-43.
- "Where Carrier Issues Receipt for Each Carton Placed in Its Freezer Trailer at Inland Point and Later Issues B/L, Each Carton, Not Trailer, is COGSA 'Package.'" Journal of Maritime Law and Commerce, II (1970-1971), 438-440.

#### Reports

- Barloon, Martin J. The Market Outlook for Freight-Carrying Highway Trailers. Pittsburg: Aluminum Company of America, 1967.
- Federal Maritime Commission, Tenth Annual Report, Helen Delich Bentley, Chairman. Washington, D.C.: US Government Printing Office, 1971.
- Kaiser Aluminum and Chemical Corporation. Containerization: An Outlook to 1977. Oakland, Calif: Kaiser Aluminum, 1968.
- Kearney and Company, Inc. Feasibility Study of an Intermodal Distribution System. New York: Kearney & Co., 1970.
- Massachusetts Port Authority. Report on the New Port of Boston. Gateway to the West. Boston: Massport, September, 1969.
- Matson Research Corporation. Report to the Maritime Administration, United States Department of Commerce. Project 370-101. The Impact of Containerization of the US Economy. Springfield, Va: National Technical Information Service, 1970.
- Port of New York Authority. Container Shipping: Full Ahead. New York: May 1967.
- Port of New York Authority, Port Promotion Division. Report of the Promotion Division. Containerization at the Port of New York. Port of New York Authority, April, 1972.
- Regular Common Carrier Conference. Report on Containerization In International and Domestic Commerce. Washington, D.C.: American Trucking Associations, Inc.



Sea-Land Service, Inc. Report on Containerization, The Sea-Land Success Story. Wheels Around The World. Elizabeth, N.J.: Sea-Land Service, Inc., 1973.

Sea-Land Service, Inc. Report on Sea-Land. The Sea-Land Story. Elizabeth, N.J.: Sea-Land Service, Inc., 1966.

Sea-Land Service, Inc. Report of Sea-Land Service, Inc. History of Sea-Land Service, Inc. Elizabeth, N.J.: Sea-Land Service, Inc., 1966.

Seamen's Church Institute of New York. Annual Report. The Look-out. New York: Seamen's Church Institute of New York, April, 1973.

Truck Trailers Manufacturers Association. Containerization, Problems of Today and Potential for Tomorrow. Washington, D.C.: Truck Trailers Manufacturers Association, 1967.

US Department of Commerce, Federal Maritime Commission. Report of the Commission. Federal Maritime Commission and How It Functions. Washington, D.C.: US Government Printing Office, 1961.

United States Freight Company. Report of the Company. United States Freight Company 1972 Annual Report. New York: United States Freight Company, 1973.

United States Steel Company. Containerization: The Outlook for Shipping Containers. Pittsburg: United States Steel Co., 1963.

### Interviews

Morrow, Giles, Secretary-General Counsel United States Freight; personal interview held in New York City April 2, 1973.

Norberg, Edward, Manager of Conference and Regulatory Affairs, Dart Containerline; personal interview held in New York City April 2, 1973.

Sundel, Daniel S., former Vice President New York, New Haven, and Hartford Railroad; presently consultant to General American Transportation Corporation; personal interview held in New York City April 2, 1973.